NO. 20587

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY CHARLES DeJONG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

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I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On June 30, 1965, the Federal Grand Jury for the Southern District of California returned an Indictment in eight counts. Count One of the Indictment charged the appellant with knowingly receiving, concealing, and facilitating the transportation and concealment of marihuana, in violation of Title 21, United States Code, Section 176a. Count Two of the Indictment charged the appellant with knowingly selling, to an undercover assistant of the Federal Bureau of Narcotics, marihuana which had been imported into the United States contrary to law, in violation of Title 21, United States Code,

Section 176a [C. T. 2, 3]. [1]

Only Counts One and Two relate to appellant. There were several other defendants named in those and other counts of the Indictment. These were: Gary Lee Tronmpeter, Alan Hann Oelke, Leon T. Graves, and John Edward Oelke. Tronmpeter and Alan Oelke were the only defendants named in Counts One and Two, other than appellant. Pursuant to pleas of not guilty by all defendants, trial by jury was set for August 2, 1965 [C. T. -A, 33, 62]. [2]

On August 2, 1965, prior to empanelling of the jury, defendant Gary Lee Tronmpeter changed his plea to guilty. Also prior to empanelling of the jury, counsel for appellant DeJong moved for a severance and separate trial for his client, on the ground that Counts One and Two of the Indictment, in which DeJong was charged, were based upon transactions unrelated to the other counts [R. T. - A 17-21]. [3] This motion was denied without prejudice. Thereafter a jury was empanelled and sworn to try the defendants then remaining, who were Alan Oelke, John Oelke, Leon T. Graves, and appellant DeJong [R. T. -A 26-44].

Subsequent to empanelling and swearing of the jury as aforesaid, the defendant Alan Oelke changed his plea, then pleading

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[1] "C. T. " refers to Clerk's Transcript.

[2] "C. T. -A" refers to the Clerk's Transcript in a related appeal, <u>Oelke and Graves v. United States,</u> No. 20864, pending before this Court. This transcript contains material relevant to both appeals, which is missing from the present transcript.

[3] "R. T. -A" refers to the Reporter's Transcript in the related appeal, <u>Oelke and Graves v. United States,</u> No. 20864, pending before this Court.

guilty to Counts Two, Seven and Eight of the Indictment [R. T. -A 57]. Since the activities of Alan Oelke appeared to the Court to be the only connecting link between the offenses charged to John Oelke and Graves (charged in Counts Seven and Eight of the Indictment), and the offenses charged to appellant DeJong, the Court thereafter, on August 3, 1965, granted appellant DeJong's motion for a severance in the interests of justice for all defendants concerned [R. T. 4-14]. [4/] The jury already empanelled was then used to try appellant DeJong separately from any other defendant named in the Indictment.

On August 5, 1965, the jury returned a verdict, finding appellant guilty of the violation of Title 21, United States Code, Section 176a, as charged in Counts One and Two of the Indictment [R. T. 497, 498].

On August 31, 1965, after the Court denied a motion for a new trial [C. T. 83], appellant was sentenced to a term of five years, pursuant to Title 21, United States Code, Section 176a [R. T. 506].

Appellant filed a timely notice of appeal on September 8, 1965 [C. T. 88].

Jurisdiction of the District Court was based on Title 21, United States Code, Section 176a, and Title 18, United States Code, Section 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

[4/] "R. T." refers to Reporter's Transcript.

II

STATUTES INVOLVED

Title 21, United States Code, Section 176a, reads as follows:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to

have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

III

QUESTIONS PRESENTED

1. Was appellant deprived of his right to jury trial, either by virtue of the fact that his peremptory challenges to the jury panel were exercised jointly with two other defendants who were subsequently withdrawn from the trial, or by virtue of the Court's failure to discharge the jury after withdrawal of such defendants?

2. Did the Court err in failing to direct a verdict of acquittal on the ground that the evidence was insufficient to show his involvement in a sale of marihuana? Was there sufficient evidence that appellant facilitated concealment, transportation and/or sale of marihuana?

3. Did the Court err in admitting to evidence expert testimony by an agent of the Federal Bureau of Narcotics as to the probable source of the marihuana introduced at trial?

4. Did the Court err in refusing appellant's offer of

proof which was intended to show that the paper in which the marihuana introduced at trial was wrapped could have had a domestic source rather than a source in Mexico?

5. Was there evidence at trial that appellant knew of the unlawful importation of the marihuana which was introduced in evidence?

6. Did the Court err in instructing the jury with respect to the offense of aiding and abetting and regarding facilitation?

7. Did the Court err in admitting into evidence testimony relating to appellant's past arrests? If so, was such error harmless?

8. Did the Court err in refusing to order a Bill of Particulars which complied with defendant's request?

IV

STATEMENT OF FACTS

On June 5, 1965, at approximately 7:00 P. M., Gordon Douglas Brucker, an informant of the Federal Bureau of Narcotics, went for a visit to the home of appellant Gary Charles DeJong, at 845 Glenway, Inglewood, California [R. T. 26]. Brucker had been acquainted with appellant for approximately two years prior to that date [R. T. 26].

At that time, Brucker and appellant had a conversation about marihuana. Appellant stated that he had no marihuana, but that he expected delivery of an ounce of marihuana within a few

minutes [R. T. 27]. Appellant made a telephone call and asked the party on the other end of the line to bring over two ounces of marihuana, one for himself and one for Brucker [R. T. 27].

Following the telephone call, Brucker asked appellant whether appellant could obtain two kilograms of marihuana [R. T. 28]. Appellant replied that he was acquainted with someone who had just received a shipment of a hundred kilograms of marihuana from Mexico and that he could obtain two kilograms from this source [R. T. 29].

Subsequently, during the same visit on June 5, 1965, one Gary Tronmpeter arrived at appellant's apartment and delivered two ounces of marihuana, one ounce going to appellant and the other ounce to Brucker [R. T. 31]. Brucker paid appellant $10.00 for his ounce of marihuana [R. T. 32].

Before Gary Tronmpeter left appellant's residence, there was a conversation between appellant, Brucker and Tronmpeter concerning marihuana. During the course of this conversation, Brucker asked Gary Tronmpeter whether Tronmpeter could get him two kilograms of marihuana. Tronmpeter replied that he could, and the price would be $120 per kilogram. It was agreed that this marihuana would be delivered by Tronmpeter to Brucker on Monday, June 7, 1965, at appellant's residence at 845 Glenway in Inglewood. Appellant agreed to these arrangements, whereupon Tronmpeter left [R. T. 32-33]. Brucker and appellant agreed at this time that appellant would receive two ounces of marihuana for setting up the Brucker-Tronmpeter deal [R. T. 39-40].

On June 7, 1965, Brucker met with agents of the Federal Bureau of Narcotics at the Federal Court House in Los Angeles, at about 5:30 P. M. At that time Brucker placed a telephone call to appellant. Brucker then spoke to appellant on the telephone and their conversation was monitored by an agent of the Federal Bureau of Narcotics [R. T. 34-35]. During this conversation Brucker asked DeJong if the transaction for purchase of two kilograms of marihuana was still set for 7:00 that evening, and appellant replied that it was [R. T. 36]. Brucker confirmed that he would be at appellant's residence at 7:00 P. M. sharp [R. T. 36].

Following Brucker's telephone conversation with appellant on June 7, 1965, Brucker was searched by narcotic agents and given $240 official government advance funds with which to make his purchase of marihuana from Tronmpeter. Then Brucker and the agents proceeded to appellant's residence, arriving there at about five minutes past seven in the evening [R. T. 36, 37]. Brucker drove in his own car. Brucker met appellant, Tronmpeter and one Alan Oelke at the foot of the stairs leading to appellant's apartment [R. T. 37]. Tronmpeter introduced Brucker to Alan Oelke, and appellant assured Brucker that the marihuana was there for the sale [R. T. 38].

At appellant's apartment, Tronmpeter and Alan Oelke agreed to meet Brucker for consummation of the sale at a parking lot at the corner of La Cienega and Centinela Boulevards [R. T. 40]. Brucker told DeJong he would see him later, then drove to the parking lot where he was met by Tronmpeter and Oelke [R. T. 41].

At the parking lot, Alan Oelke got out of his car and got into Brucker's car, into the passenger seat. At that time Alan Oelke was carrying a brown paper sack containing two bricks of marihuana. Oelke placed the bag on the front seat of Brucker's car [R. T. 42]. Brucker then paid to Oelke the $240 advance funds and took delivery of the marihuana [R. T. 44]. The sack and two bricks of marihuana were identified and admitted in evidence at the trial below [R. T. 44].

Thereafter, when the transaction with Oelke and Tronmpeter had been completed, Brucker met agents of the Federal Bureau of Narcotics at a nearby location. At this time he was again searched for money or other narcotics, with negative results [R. T. 44]. Brucker then delivered the marihuana which he had purchased to agent Theodore Yanello of the Federal Bureau of Narcotics [R. T. 44].

V

ARGUMENT

1. APPELLANT WAS NOT DEPRIVED OF HIS RIGHT TO JURY TRIAL AT THE TRIAL BELOW, EITHER BY VIRTUE OF THE FACT THAT HIS PEREMPTORY CHALLENGES TO THE JURY PANEL WERE EXERCISED JOINTLY WITH OTHER DEFENDANTS WHO WERE SUBSEQUENTLY WITHDRAWN FROM THE TRIAL, OR BY VIRTUE OF THE COURT'S FAILURE TO DISCHARGE THE JURY AFTER WITHDRAWAL OF SUCH DEFENDANTS.

As appears from the factual account contained in Section I,

supra, when the jury was selected, impanelled and sworn in the trial court there were four defendants before the court: Alan Oelke, John Oelke, Leon T. Graves, and appellant DeJong. Subsequently Alan Oelke changed his plea to guilty and John Oelke and Graves were severed out of the trial, leaving appellant the sole defendant to be tried by that jury.

Appellant now assigns as error the failure of the trial judge to permit him to select another jury to try himself alone. Appellant objects to having had to share the ten peremptory challenges allotted to the four defendants at the time the jury was selected. Appellant cited no authority for his position.

The rule is that the defendants, no matter how many of them there are, are entitled to ten peremptory challenges in this type of case, and no more. Rule 24(b) of Federal Rules of Criminal Procedure provides in pertinent part:

> "If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. . . . If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly."

It is clear that use of the word "may" in the final sentence of Rule 24(b) confers on the trial court a discretion, but not a duty, to allow additional peremptory challenges to multiple defendants. Appellant's assignment of prejudicial error to the trial court's

failure to allot ten peremptory challenges to himself alone, when there were other defendants involved in selecting the jury, is without legal foundation.

It is a common circumstance that multiple defendants may be involved at the earliest stages of a trial, and later the number of defendants will be reduced to one. This could occur, for example, when a motion for judgment of acquittal is granted for less than all of the defendants, as well as where less than all defendants change their plea to guilty. To contend that these developments would require selection of a new jury so that the remaining defendant may exercise ten peremptory challenges, is to contend for a bizarre and erroneous rule of law.

The authority of the Supreme Court to make Rule 24(b), as well as the other federal rules, is clear in the statute, Title 18, United States Code, Sections 3771, 3772. There is no basis to question the validity or construction of that Rule.

Moreover, the record reflects that appellant's trial was severed from that of his co-defendants at his own motion. Having contended for and received a separation of his trial subsequent to swearing of the jury, appellant accepted the burdens as well as the benefits of a separate trial. Further, the record shows that appellant's counsel did not designate any prospective juror whom he wished to challenge and whom he was unable to challenge.

Further reasons assigned by appellant to the impropriety of his having been tried by the particular jury empanelled are: (1) that that jury was read the eight-count Indictment involving

other defendants as well as appellant; and (2) that the jury was exposed to a large exhibit of marihuana which pertained solely to defendants other than appellant. These contentions are not supportable by case law, nor has appellant sought to support them. In many cases where a single defendant is on trial the Indictment refers as well to other defendants not being tried: to say that the reading of such an Indictment is prejudicial error is simply to make an unsupported assertion.

There is nothing in the record on this appeal which would indicate that the jury below was aware of the contents of any packages which were brought into the courtroom prior to the severance of other defendants. So far as they knew and so far as the record shows, those packages could have contained any of numerous things other than marihuana. On the record, no error appears in the trial judge's failure to declare a mistrial because the jury saw the exterior of such packages.

2. THE TRIAL COURT PROPERLY REFUSED TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL; SINCE THE EVIDENCE WAS LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION.

Appellant contends that there was insufficient evidence of his facilitation of the sale, concealment and/or transportation of marihuana to support his conviction, and that the trial court erred in refusing his motion for judgment of acquittal, made pursuant to

Rule 29 of the Federal Rules of Criminal Procedure.

When the appellate courts consider an attack upon the sufficiency of the evidence on appeal, the general rule is that they must view the evidence at trial in the light most favorable to the Government.

> Glasser v. United States, 315 U. S. 60 (1942);
> Noto v. United States, 367 U. S. 290 (1961);
> Stein v. United States, 327 F. 2d 825 (9 Cir. 1964), cert. den. 377 U. S. 970.

The evidence before the trial court showed that appellant introduced Gordon Douglas Brucker to Gary Lee Tronmpeter for the purpose of a sale of marihuana by Tronmpeter to Brucker [R. T. 37], and that the sale was actually made. This is a sufficient showing of facilitation of concealment, transportation, and/or sale of marihuana on the part of appellant. For to facilitate means to make easy or less difficult. To facilitate in any manner the transportation or concealment or sale of marihuana, within the contemplation of Title 21, United States Code, Section 176a, means willfully to do any act which makes less difficult in any way the concealment or transportation or sale of marihuana.

> Vasquez v. United States, 290 F. 2d 897 (9 Cir. 1961).

The activities of appellant, as shown in the record, easily meet this test of "facilitation". Indeed, the record shows that without appellant's knowing activities as intermediary there would have been no sale of marihuana by Tronmpeter or Oelke to Brucker, for they

would never have met. The record further shows that appellant willingly offered the use of his apartment for negotiation of the sale and actively participated in such negotiation.

The credibility of witnesses and the weight to be given to their testimony is a matter within the province of the trial jury and the trial court, which have seen and heard the witnesses.

Stoppelli v. United States, 183 F. 2d 391
(9 Cir. 1950), cert. den. 340 U. S. 864;
Norfolk v. McKenzie, 116 F. 2d 632 (6 Cir. 1941).

It is clear that in the present case there was substantial evidence to support giving the case to the jury, and further substantial evidence to justify the jury's verdict. That being so, the court should sustain the verdict and conviction.

Glasser v. United States, supra;
Noto v. United States, supra.

3. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE EXPERT TESTIMONY BY AN AGENT OF THE FEDERAL BUREAU OF NARCOTICS AS TO THE PROBABLE SOURCE OF THE MARIHUANA WHICH WAS PLACED IN EVIDENCE AT TRIAL.

At trial, the Government sought to prove that the marihuana admitted in evidence against appellant had been brought into the United States unlawfully from a foreign country, and specifically from Mexico. For this purpose the Government qualified Agent Theodore Yanello of the Federal Bureau of Narcotics as an expert

witness on the origin of the packages of marihuana.

Agent Yanello's testimony was to the following effect: That he had fourteen years of experience with the Federal Bureau of Narcotics, investigating marihuana cases [R. T. 135]; that he had participated in the investigation of the instant case [R. T. 134-137]; that in fourteen years he had worked on 125 to 150 cases involving marihuana, in the States of Washington, Nevada, and California, and in Mexico [R. T. 137]; that he had worked on twenty or twenty-five cases in Mexico [R. T. 138]. Agent Yanello further testified that in his opinion the two bricks in evidence had come from Mexico [R. T. 140]. His reasons for this opinion were as follows: The marihuana was compressed in kilogram quantities, the kilogram being a system of measure used in Mexico but not in the United States [R. T. 140]; it was compressed into brick form [R. T. 141]; the type of wrapping on the two bricks was the type used characteristically in Mexico, but not used in the United States [R. T. 141]; the green color of the wrapping was typical of a Mexican source and Yanello had never seen such wrapping on domestic marihuana or in domestic narcotic traffic [R. T. 142]. Agent Yanello further testified that in his experience domestic marihuana was never transported in the form of compressed bricks, but always in loose bulk form [R. T. 143].

Appellant contends that this testimony of Agent Yanello was improperly admitted at trial, because Yanello was not a qualified expert witness as to these matters.

Expert testimony of a witness may be admitted in cases

where the jury is unable, as a body of laymen, to bridge the gap between the facts before it and the conclusions to be drawn therefrom. In such cases assistance is needed from one possessing special skill in the area involved. The need for and admissibility of such evidence is within the discretion of the trial judge.

Harris v. Afran Transport Co., 252 F.2d 536 (3 Cir. 1958);

Rhodes v. United States, 282 F.2d 59 (4 Cir. 1960), cert. den. 364 U.S. 912;

Campbell v. Clark, 283 F.2d 766 (10 Cir. 1960).

If expert testimony is found appropriate, the qualifications of a particular witness, as to his special or technical knowledge, are likewise within the discretion of the trial judge. If the trial judge finds the witness appropriately qualified, his exercise of discretion in this regard will not be disturbed on appeal, absent an abuse of discretion.

United States v. Freundlich, 95 F.2d 376 (2 Cir. 1938);

Tucker v. Loew's Theatre & Realty Corp., 149 F.2d 677 (2 Cir. 1945).

At the trial below, Agent Yanello was testifying to matters within his personal knowledge and experience, as clearly appears from those portions of his testimony cited above. The jury, as laymen, could not be expected to draw appropriate inferences from the wrappings and configuration of the packages of marihuana, but Agent Yanello as an expert could do this. It is submitted that the

admission of Agent Yanello's testimony as to his expert opinion concerning the source of the marihuana in question was entirely proper.

4. THE TRIAL COURT PROPERLY REFUSED APPELLANT'S OFFER OF PROOF WHICH WAS INTENDED TO SHOW THAT THE PAPER, IN WHICH THE MARIHUANA INTRODUCED AT TRIAL WAS WRAPPED, COULD HAVE HAD A DOMESTIC SOURCE RATHER THAN A SOURCE IN MEXICO.

During the course of trial, in the rebuttal phase of testimony, appellant's counsel made the following offer of proof [R. T. 401-402]:

> "MR. HARRIS: I would like, at this time, to make an offer of proof. The offer of proof is that we are willing to produce a witness from Zellerbach Paper Company who will identify the paper in question [in which the exhibit marihuana was wrapped] as nine-inch counter-roll drug wrap, sold through the Zellerbach Company for wide distribution for stores throughout Los Angeles and California." [Matter in brackets added.]

The purpose of this offer of proof, which was rejected by the trial court, was apparently to rebut Agent Yanello's testimony that the use of the subject paper as wrapping for the marihuana indicated that the marihuana had its origin and source in Mexico.

But it was no part of the Government's case to show that

the subject paper was not available in the domestic market. Rather, the Government sought to show by Agent Yanello's testimony that the paper was characteristically used to wrap marihuana in Mexico but was not used to wrap marihuana which had its source in the United States. Thus, whether such paper is made and distributed in the United States is irrelevant, and appellant's offer of proof was properly rejected.

5. THERE WAS SUFFICIENT EVIDENCE AT TRIAL THAT APPELLANT KNEW OF THE UNLAWFUL IMPORTATION OF THE MARIHUANA WHICH WAS INTRODUCED IN EVIDENCE.

At trial, appellant's knowledge that the marihuana concerned had had its source in Mexico came into issue. Such knowledge was dealt with in the testimony of Government witnesses Gordon Douglas Brucker and Gary Tronmpeter.

Brucker testified [R. T. 30] that on the occasion of their meeting on June 5, 1965, appellant told him that appellant was acquainted with a connection for marihuana who had just received a shipment of one hundred kilograms of marihuana from Mexico. Gary Tronmpeter was introduced to Brucker as such connection on June 5, 1965 [R. T. 31, 297].

This testimony was corroborated at trial by that of Gary Tronmpeter. Tronmpeter testified that prior to June 5, 1965, on the day he brought marihuana to appellant's house, he told appellant that the person who provided the marihuana to Tronmpeter had

said that it came from Mexico City [R. T. 292-294].

It is submitted that the foregoing testimony was sufficient, when taken along with the testimony of Agent Yanello outlined in Part 3 of appellee's argument, supra, to establish appellant's knowledge that the subject marihuana had its source in a foreign country, Mexico.

Moreover, the finding necessarily made by the jury that appellant had such knowledge must be sustained on appeal if the evidence shows such knowledge when viewed in the light most favorable to the Government.

Glasser v. United States, supra;
Noto v. United States, supra;
Stein v. United States, supra.

6. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH RESPECT TO THE OFFENSE OF AIDING AND ABETTING, AND WITH RESPECT TO APPELLANT'S FACILITATION OF THE CRIME CHARGED.

At the trial below, the Court instructed the jury as follows [R. T. 478-480]:

> "The guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures the

commission is punishable as the principal.

"Whoever wilfully causes an act to be done, which if directly performed by him or another, would be an offense against the United States and is punishable as a principal. Every person who thus wilfully participates in the commission of a crime may be found to be guilty of that offense. Participation is wilful if done voluntarily and intentionally, and with a specific intent to do something which the law forbids. That is to say, with bad purpose to disregard or disobey the law.

"You will note that Gary Lee Tronmpeter and Alan Hann Oelke are jointly charged with the defendant Gary DeJong in Counts One and Two. While you are not to determine the guilt or innocence of Tronmpeter and Oelke, since they are not before you, there is evidence before you of their acts and declarations.

"In a case where two or more persons are charged with a commission of a crime, guilt of the accused may be established without proof that the accused personally did every act constituting the offense charged. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures the commission is punishable as a principal.

"Whoever wilfully causes an act to be done

> which if directly performed by him or another would be an offense against the United States and is punishable as a principal. Every person who has wilfully participated in the commission of a crime may be found to be guilty of that offense.
>
> "Participation is wilful if voluntarily and intentionally and with specific intent to do something that the law forbids or with a specific intent to fail to do something that the law requires to be done. That is to say, with bad purpose either to disobey or disregard the law.
>
> "In order to aid and abet another to commit an offense it is necessary that the accused wilfully associate himself in some way with the criminal venture and wilfully participate in some way with the criminal venture, and wilfully participate in it as he would in something he wishes to bring about. That is to say, that he wilfully seeks by some act or omission of his to make the criminal venture succeed."

Appellant assigns the giving of these instructions as error, since appellant was charged in the Indictment as a principal in concealing, transporting and/or selling marihuana illegally brought into the United States and was not directly charged with aiding and abetting.

United States Code, Title 18, Section 2 provides:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> "(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

It is well established that a person charged in an Indictment only as a principal may be convicted on evidence that he aided and abetted commission of the crime charged.

Grant v. United States, 291 F. 2d 746
(9 Cir. 1961);

Nye & Nissen v. United States, 168 F. 2d 846
(9 Cir. 1948);

And see:

Stewart v. United States, 311 F. 2d 109
(9 Cir. 1962).

Such evidence with respect to appellant, showing that he aided and abetted the sale, concealment, and/or transportation of marihuana by Alan Hann Oelke and Gary Lee Tronmpeter, was presented at trial. See Section 2 of Argument, supra. Accordingly, it is submitted that the trial court acted properly in instructing the jury on the issue of aiding and abetting on appellant's part.

The Court further instructed the jury with respect to the

meaning of the word "facilitate" as used in United States Code, Title 21, Section 176a and in Count One of the Indictment:

> "To facilitate, as used in the statute in the elements of this case, means to make easy or less difficult. So, to facilitate in any manner the transportation or concealment or sale of a narcotic drug means wilfully to do or fail to do an act which makes less difficult in any way the concealment or transportation or sale of the narcotic drug."

This instruction was clearly proper.

Vasquez v. United States, 290 F. 2d 897 (9 Cir. 1961);
Bruno v. United States, 259 F. 2d 8 (9 Cir. 1958);
Pon Wing Quong v. United States, 111 F. 2d 751 (9 Cir. 1940).

Nor was evidence of appellant's facilitation of the concealment, transportation and/or sale of marihuana lacking. See Section 2 of Argument, supra. The same evidence which showed aiding and abetting by appellant would show the prime offense of facilitating.

7. THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY RELATING TO APPELLANT'S PAST ARRESTS; IF IT DID ERR, THE ERROR WAS HARMLESS.

In the course of the Government's cross-examination of appellant at the trial below, the following occurred [R. T. 257-258]:

"Q. BY MR. PINES: Were you arrested in March of this year?

"A. Yes.

"Q. What was the charge?

"A. Burglary and drunk.

"Q. And what happened to that charge?

"A. They dropped it.

"Q. What had you been doing?

"A. Drinking.

"Q. You were drunk?

"A. (Nodding.)

"THE COURT: What does that have to do with the offense (sic) of entrapment?

"MR. HARRIS: I move for a mistrial on prejudicial misconduct by the prosecutor if he knew those were the questions he was going to ask. He specifically told the Court he was going to show predisposition to this offense. I would like the prosecutor censored (sic) for this and I want to move for a mistrial at this time.

"THE COURT: The motion for a mistrial is denied. The last two questions and answers are ordered stricken from the record; and, I admonish the jury to disregard these questions and answers."

Based upon the foregoing, appellant now contends that the

trial court prejudicially erred in denying appellant's motion for a mistrial on the ground of prejudicial misconduct by the prosecutor.

But the trial court excised from the record and admonished the jury to disregard the prejudicial portions of the quoted testimony. These were the questions and answers as follows:

> "Q. What had you been doing?
>
> "A. Drinking.
>
> "Q. You were drunk?
>
> "A. (Nodding.)"

The prosecutor prefaced this line of questioning by stating [R. T. 257]:

> "MR. PINES: We are concerned with entrapment in the defense here and I am going into the predisposition of this defendant. This evidence of prior offenses is admissible, as I can read the language of the Supreme Court."

Clearly, evidence of predisposition on a defendant's part is admissible to negate the defense of entrapment.

Sherman v. United States, 356 U. S. 369 (1958);
Masciale v. United States, 356 U. S. 386 (1958).

In showing prior acts, the prosecution may make inquiry into a defendant's previous conduct.

> "The predisposition and criminal design of the defendant are relevant; . . . [If] the defendant

> seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

Sorrells v. United States, 287 U. S. 435, 451-452 (1932).

It is clear on the record of the trial below that the prosecutor was indeed making such a searching inquiry in approaching this line of questioning.

Moreover, even if the entire line of questioning concerning appellant's arrest for burglary and drunkenness was irrelevant to the issue of entrapment and therefore was improperly admitted, such error was clearly harmless and not prejudicial to appellant. Such arrest then would have nothing to do with the case and, in view of all of the other evidence against appellant, would not be prejudicial.

McRaye v. United States, 163 F. 2d 868 (9 Cir. 1947);

Kowalchuk v. United States, 176 F. 2d 873, 878 (6 Cir. 1949).

Where the record contains sufficient evidence of guilt, the Court of Appeals should not reverse a conviction because unimportant and irrelevant testimony may have crept in, unless there is strong reason to think that practical injustice has been done.

United States v. Waldau, 115 F. 2d 486 (2 Cir. 1940).

8. THE TRIAL COURT PROPERLY REFUSED TO ORDER THE GOVERNMENT TO FURNISH A BILL OF PARTICULARS WHICH COMPLIED WITH DEFENDANT'S REQUEST FOR A BILL OF PARTICULARS.

The trial court denied all but two of the numbered requests submitted by appellant and constituting his Motion for Bill of Particulars [C. T. 10-17]. This denial is assigned by appellant as prejudicial error.

At the outset, it must be noted that whether to grant a motion for a bill of particulars is within the discretion of the trial court. A determination of such a motion will not be disturbed on appeal in the absence of an abuse of discretion.

Wong Tai v. United States, 273 U. S. 77 (1927);

Yeargain v. United States, 314 F. 2d 881 (9 Cir. 1963);

Cooper v. United States, 282 F. 2d 527 (9 Cir. 1960);

Rodella v. United States, 286 F. 2d 306 (9 Cir. 1960), cert. den. 365 U. S. 889;

Schino v. United States, 209 F. 2d 67 (9 Cir. 1954), cert. den. 347 U. S. 937;

Frederick v. United States, 163 F. 2d 536 (9 Cir. 1947), cert. den. 332 U. S. 772.

The purpose of a bill of particulars is twofold, as stated

in Cooper v. United States, supra, 282 F. 2d at p. 532:

> "A bill of particulars should be granted where it is thought necessary (1) to protect the defendant against a second prosecution for the same offense, or (2) to enable the defendant to adequately prepare his defense and avoid surprise at trial."

In answer to appellant's contention that he was surprised by the nature of the charges facing him at trial (Brief for Appellant, pp. 73-79), it should be noted that if there was such surprise, appellant might have moved at the start of trial for a continuance; however, he failed to do so. Moreover, Counts One and Two of the Indictment, the counts involving appellant, are clear in their purport and advised appellant of the charge which he was called upon to answer [C. T. 1, 2].

The trial court clearly acted within its discretion when it denied appellant's requests. Even a cursory examination of these requests [C. T. 11-15] shows that they seek information involving divulging of evidentiary matters, a list of witnesses, and particulars clearly stated in the Indictment. Accordingly, the trial court's denial of these requests was dictated by the language of the Supreme Court in Wong Tai v. United States, supra, 273 U. S. at p. 82:

> "The defendant also made a motion, supported by affidavit, for a detailed bill of particulars setting forth with particularity the specific facts in reference to the several overt acts alleged in the indictment,

> with various specifications as to times, places, names of persons, . . ., etc., and the manner in which, the specific circumstances under which they were committed. This motion - which in effect sought a complete discovery of the Government's case in reference to the overt acts - was denied on the ground that the indictment was sufficiently definite in view of the unknown matters involved and the motion called for too much detail of the evidence."

Moreover, in the present case the identity of the Government's informer, Gordon Douglas Brucker, was revealed to appellant's counsel prior to trial, and Brucker appeared as a witness for the Government. This case is thus entirely different from that of Roviaro v. United States, 353 U. S. 53 (1957). Roviaro was a case where the Government had refused to make disclosure of the informant's identity, and under the circumstances a reversal of the petitioner's conviction resulted. Here, on the contrary, there was full disclosure prior to trial of the informant's identity (Brief for Appellant, p. 77). The Court in Roviaro clearly recognizes the Government's interest in nondisclosure of an informant where danger to the informant or detriment to the public interest would result from disclosure.

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer
MICHAEL HEUER